

No. 77-494

Supreme Court, U. S.

FILED

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IN THE  
SUPREME COURT  
OF THE UNITED  
STATES

November Term, 1977

GEMEINDE BRAU, INC.  
PAUL A. ZIMMERMAN  
EMMA J. ZIMMERMAN and  
COLD SPRING BREWING CO.

Petitioners,

v.

AMANA SOCIETY, and  
AMANA REFRIGERATION, INC.,

Respondents.

REPLY BRIEF OF PETITIONERS and OPPOSITION  
TO RESPONDENTS MOTION UNDER RULE 56(4)

WARREN H. KINTZINGER  
777 South Central Expressway  
Suite 3-E  
Richardson, Texas 75080

## TABLE OF AUTHORITIES

### Cases

Phi Delta Theta Fraternits v. J.A. Buchroeder, 149 U.S.P.Q. 159; 251 FS 968 - 1966	. . . . .	2
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Redd v. Shell Oil Company 184 U.S.P.Q. 675 - 1974	. . . . .	3
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### Statutes

15 U.S.C. 1 Section 1 of the Sherman Act	. . . . .	1
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15 U.S.C. 1115(a)	. . . . .	2
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15 U.S.C. 1115(b)(7)	. . . . .	3
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In response to Brief for Respondents in Opposition and Motion Under Rule 56(4), petitioners are compelled to respond to a specific issue before the response to other issues raised would normally occur during trial.

Turning to Section B on page 11 of Brief for Respondents in Opposition and Motion Under Rule 56(4), petitioners would point out the following:

In the first paragraph, respondents note that it is "significant that petitioners cite no decisions supporting their assertion" (of alleged violation of Section 1 of the Sherman Act 15 U.S.C. 1).

Surely the meaning of this basic anti-trust statute is not so vague that it requires a court decision to interpret its clear wording that identifies an anti-trust violation as being "Every...combination... in restraint of trade...". It was enacted to prevent restraint of trade by more than one entity acting in "combination". Respondents have not denied that such a letter (Exhibit D-11) was written and they cannot deny that the action of both Amana Society and the Oktoberfest Committee did result in restraint of sale of any and all Gemeinde Brau products and such restraint was motivated because one only of Gemeinde Brau's products bore the legend "AMANA BEER, Amana, Iowa" which Amana Society felt infringed their trademark of "AMANA" for breads, meats, etc., but the letter (Exhibit D-11) was not so restricted, and restrained the sale of other beers of

petitioners, bearing the names "Gemeinde Brau" and "Cold Spring Beer" which names were not the subject of any court injunctions, which restraint of trade and restriction of sale by Amana Society and the Oktoberfest Committee cannot be denied by respondents (and such instilled restraint continues with lingering induced fear among certain local retailers). Furthermore, beer manufactured in Cold Spring, Minnesota, and sold in Iowa, is, per se, interstate commerce.

Moreover, petitioner's initial brief (Brief and Argument of Defendants, page 3) did in fact, cite a decision to point out that an anti-trust violation was a defense in a trademark infringement action (Phi Delta Theta Fraternity v. J.A. Buchroeder, 149 U.S.P.Q. 159; 251 FS 968 - 1966) which stated "Not only is violation of antitrust laws a defense to trademark infringement, but also injured party may base thereon an action for violation of antitrust laws."

Petitioners are not foreclosed from attacking the validity of Amana Society's trademark and even if a trademark is "incontestable" this incontestability applies only to "goods" and services specified in the registration" according to 15 U.S.C. 1115(a); and beer has never been so specified.

Respondent's action in sending the letter that resulted in this restraint of trade, was a use (or rather misuse) of the trademark itself to achieve the restraint of trade even to products not bearing the alleged infringing trademark, and was an

anti-trust violation.

Respondents statement on page 12, lower half of paragraph (2), that 15 U.S.C. 1115 (b)(7) "merely affects the incontestability of the registration" is simply incorrect. The cited Phi Delta Theta case holds with unmistakeable clarity that:

"[4] In similar manner, we may not lightly assume that the enactment of laws under which trademarks could be registered or equitable principles applicable to trademarks generally were intended to render ineffective the execution of the national economic policy of the United States as long expressed in the antitrust laws; particularly, when in the most recently enacted trademark law, the Lanham Act, in Section 33(b)(7), (Section 1115 (b)(7), Title 15 United States Code) expressly provides that the violation of the anti-trust laws shall be a defense to trademark infringement." (Emphasis added)

Other recent cases repeat the legal ruling that an anti-trust violation is a defense in a trademark infringement rather than merely a defense to the incontestability of the mark. See Redd v. Shell Oil Company, 184 U.S.P.Q. 675 - 1974, which holds:

"The legislative history of Section 33(b)(7) of the Lanham Act makes clear the intent of Congress to bar infringement actions on marks being used to violate the antitrust laws of the United States. Subsection 7 of Section 33(b)

was inserted in the final bill at the insistence of the Senate and by agreement at the Conference Committee of the Senate and the House. The Conference Committee Report stated that 'This amendment provides that the use of a registered mark in violation of the antitrust laws shall constitute a defense to a suit by the registrant.' 92 Cong. Rec. 7872 (79th Cong., 2nd Sess., June 25, 1946). Senator O'Mahoney, a member of the Conference Committee and sponsor of the amendment, insisted that the purpose of the amendment be made absolutely clear: 'Mr. President, the point I wish to make perfectly clear is that the use of such a mark to violate the antitrust laws constitutes a defense to an infringement suit.' 'It is of such great importance to the public of the United States that restraints of trade shall not be permitted, that the Senate inserted this amendment, to make it a defense to an infringement suit as well as to make it a ground for contestability if it should be shown that the registrant was using the mark itself to violate the antitrust law.' (92 Cong. Rec. 7873)

All three Senate conferees agreed that the test is not 'that the trademark must be used in violation of the anti-trust laws as the sole and efficient cause', but that 'it must at least be one of the active, proximate causes in the violation.'

Referring to page 13, the motive behind the Amana Society's action in writing the



letter (Exhibit D-11), whether "anger" or "dismay" is, of course, totally irrelevant to the fact that the result was a restraint of trade by a combination of entities and thus an anti-trust violation and a defense in a trademark action.

Respondents speculation on the "probable reasons" why the courts below did not touch on the issue of the anti-trust violation is not, in petitioner's view, of importance. What is important in petitioner's mind is that this very crucial issue was not ruled on. In view of this fact alone, petitioners are justified in pursuing (in fact, would be derelect in not pursuing) this appeal, since justice cannot be discharged without such a ruling.

Respondents request for denial of Petition for Writ of Certiorari and their Motion for Award of Damages under Rule 56(4) should not be allowed.

Petitioners respectfully petition that the Supreme Court accept this case and rule on at least this anti-trust matter that our Government considers a most important area of the law today, or remand this case to the courts below so they may specifically so rule.

Respectfully submitted,

Warren H. Kintzinger  
Suite 3-E  
777 So. Central Expwy.  
Richardson, Texas 75080  
Attorney for Petitioners